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LAW OF CARRIERS BY LAND, WATER AND AIR.*

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Introduction.

The law of carriers by land, water and air is more or less governed by the law of "common carriers."

"Carriers" are of two kinds. They may be private carriers carrying goods of particular persons and on occasions and, not of all, indiscriminately; though they might invite all, they might reserve the right to accept or reject. But even they are bound to take reasonable care of the goods entrusted, but not liable if the owner contributes to their loss or damage or keeps them under his control or if the loss arises from the misconduct or want of care of the owner. Public carriers hold themselves out as willing to carry for remuneration all and sundry and their goods indiscriminately, carrying on the work not as a casual occcupation but as a public business, provided the passengers and goods are in fit state and provided the accommodation is sufficient. The Indian Carriers Act of 1865 defines a carrier as a person engaged in a special business of transporting property for hire for all persons indiscriminately. It does not matter if he holds out to undertake a special voyage: *The India General Navigation Co.* v. *Dekhare Tea Co.*[1] He might profess to carry only small parcels or goods of one description, or only to certain places. There might be gratuitous carriers. But if they do it as a business and carry indiscriminately they are common carriers. They are also bound to use the same amount of reasonable care. The real test is, "has he the right to reject any passenger or goods for no sufficient cause"; if he has, he is not a common carrier. A common carrier cannot restrict his liability or that of his servants by any condition. See *Peek* v. *North Straffordshire Ry. Co.*[2] Again there are carriers for reward who may not be common carriers but bailees under sections 151 and 152 of the Indian Contract Act. By "Carriers" is meant, in this article "common carriers."

The origin of the "Law of common carriers" is attributed by Denman, J., to Roman Law (See *Nugent* v. *Smith*[3]). But Cockburn, C.J., in the Court of Appeal dissents from this view and traces it to the English Common Law (*Nugent* v. *Smith*)[4] with which Holmes, C.J., of the Supreme Court of the United States agrees. *Vide*, Holmes' Common Law, Lecture V.

There are common carriers by land, water and air the last of which came into prominence after the Great War of 1914-18. Among carriers by land there are carriers by ordinary roads such as owners of horses, pack horses, stage coaches,

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1. (1923) 93 L.J.P.C. 108.
2. (1863) 10 H.L.C. 473 and 511.
3. (1875) 1 C.P.D. 19.
4. (1876) 1 C.P.D. 423, A.C.

hackney carriages, buses and cars; there are tramways and Railways, propelled by electric and steam power. Among carriers by water, there are inland and coastal steamers and steamers sailing over distant seas, barges, flats, lighters and also even boatsmen, carrying goods for hire for all indiscriminately. Among carriers by air, may be included, airships, aeroplanes, balloons and gliders, etc.

The liability of the common carrier at common law for goods and luggage is that of an insurer of goods entrusted with him except when the loss or damage is caused by the act of God or King's enemies. But when goods or luggage are under his control, then he will not be liable as an insurer if the goods or luggage are lost through passenger's neglect. And when they are in the passenger's actual control such as a watch, etc., the carrier will be liable only if the loss is caused by his neglect. In the case of a passenger, the carrier is bound only to take ordinary care for the passenger's safety, and is liable for negligence.

As regards the common carriers of goods by land and by water it is settled law (*Coggs* v. *Bernard*[1]) that they are liable as insurers of goods and are under an absolute liability for loss or damage to goods entrusted to their care for carriage unless saved by the old common law exceptions such as the act of God or King's enemies, etc. There are certain statutory exemptions of recent date. Before dealing with those common law and statutory exceptions it is necessary to consider whether the carriers by air such as aeroplanes, airships and dirigibles are common carriers in the legal sense.

The principles underlying the law of carriage should be the same in and over whatever element the traffic is. But for some doubt cast on the position in a recent decision in *Aslan* v. *Imperial Airways Ltd.*,[2] the same principles of the law of carriage for land and water would have been considered as applicable to carriage by air. In that case the Imperial Airways, Ltd., were held not to be a common carrier. The case was decided on the special facts that the company never held out as a common carrier; and the decision turned on the special terms of the contract. In that case an owner of two bars of gold entrusted them to an air transport company, the Imperial Airways, Ltd., for transit from Bagdad to London. At some stage of the journey when the gold was transhipped from a land machine to a sea plane, it disappeared. The company had excluded their liability by two clauses, one to the effect that they reserved the right to reject any goods as they liked, thereby indicating that they are not following the profession of a common carrier, and the second clause provided that all goods were subject to a general transport condition for air freight service which were received by or in the custody of Messrs. Imperial Airways, Ltd., (who were not common carriers) or of their agents for carriage or otherwise. It is clear therefore that the Imperial Airways Ltd., purported to act only as a private carrier, and as a private carrier their liability is only for negligence which could be got rid of by a clause in the consignment note that the company accepted freight at the consignor's risk. This decision does not lay down any general rule. Further, the learned Judge observed that there was no reason why a man who carried goods by a machine that travelled through the air should not be a common carrier if he acted as a common carrier. Thus it follows that in the absence of any statutory provision the principles of common law applicable to a common carrier will be applied by Courts to cases arising from carriage by air transport.

The liability of a common carrier whether it is by land, water or air must be deemed to be that of an insurer, subject to the limitations imposed upon it by common law and statute. The earlier common law exception to the liability of common carrier was loss caused by act of God and King's enemies.

"Act of God," may be taken to be an accident due to natural causes, without human intervention and not preventible by human foresight. To be an act of God, the accident should be independent of human action and could not be avoided or guarded against; if it could have been foreseen, it could not have been

1. (1703) 2 Ld. Raym. 909 at 917. 49 T.L.R. 415.
2. (1933) 38 Com. Cas. 227 : 149 L.T. 276.

prevented such as lightning, or forces of nature such as floods, etc. It need not have been extraordinary or violent.

The term "King's enemies" means and includes armed Forces of a foreign power at war with the King. This does not include rioters and robbers on land but includes pirates and robbers on high seas as pirates and robbers are considered as enemies of all nations. A carrier is bound to avoid acts of King's enemies but he ceases to be liable if he attempts to avoid, though he might fail.

Inherent defect or vice in the thing carried—no matter whether the thing carried is goods or animal—is another common law exception. The carrier is bound to exercise such care as the nature of the thing demands, unless he is misled by the consignor not giving him due notice as to the defective nature of the goods or animals carried. Further, the loss or damage should not be traceable to the consignor.

Another equally important common law exception is the defective packing through the fault of the consignor and of which defective packing the carrier had no notice. If the carrier has notice of the defective packing or if the carrier does anything to make the consignor believe that the packing is safe and sufficient, the carrier cannot claim the benefit of the exemption.

The above exception may be considered as applicable to carriers by land, water and air. But there is another exemption which is peculiar only to the carriers by water namely the right to jettison to save a ship and rest of the cargo from imminent and impending danger.

These common law exceptions from liability are not available to a common carrier if he has been negligent or if he has deviated or if the vehicle is not 'fit' for the purpose.

As regards deviation, in a leading case *Thorley Ltd.* v. *Orchis Steamship Co.*,[1] deviation was held to alter the character of the voyage so that a shipowner guilty of it cannot be held to have performed his part of the bill of lading contract and cannot claim the benefit of the stipulation contained in the bill of lading although no damage was caused by deviation. In the case of a carrier of passengers deviating, the carrier is liable only if he is negligent. To find out the ordinary commercial route the Court will consider parol evidence on the point. *Frenkel* v. *MacAndrews and Co.*[2]

As to the implied warranty of fitness of the vehicle or conveyance by water, at common law there is an absolute warranty of the seaworthiness of the carrying vessel. The Shipowners' liability is absolute even for defects not discoverable by careful examination. In the United States of America the same stringent rule of liability is imposed on the carriers by sea. To be 'Seaworthy,' the ship should be fit in design and structure to encounter ordinary perils of the voyage and the ship and her equipment must be suitable for the safe carriage of such goods. In voyage by stages it should be seaworthy at successive voyages, and in voyages by time-charter at the commencement of the voyage. The seaworthiness must exist both at the time of loading and at the time of sailing but there is no implied warranty of continuous "seaworthiness." In *Barrett* v. *London General Insurance Co.*,[3] it was held that not only the shipowners should do their best to make their ship fit but that the ship should really be fit.

Regarding the fitness of vehicle of a carrier by land, the law remains uncertain and the decisions are conflicting. In an earlier English case there is a dictum, that the proprietor of a coach, not in a roadworthy condition, was to be held liable for the consequences in the same way as a ship-owner furnishing a vessel not seaworthy. But in *Readhead* v. *Midland Ry. Co.*,[4] it was held that the common carriers by land do not undertake the warranty of fitness of their vehicles. In this case the plaintiff sought damages for injuries by an accident caused by the breaking of the tyre of a wheel of a railway carriage. It was contended for the plaintiff that

1. (1907) 1 K.B. 660 at 669.
2. (1929) A.C. 545.
3. (1935) 1 K.B. 238.
4. (1869) L.R. 4 Q.B. 379 at 387.

the owners of the carriage are bound to keep it in a roadworthy condition. The Court did not uphold the contention, with Blackburn, J., dissenting at p. 383, "But first it is extremely doubtful whether such warranty can be predicated to exist in the contract of the common carrier of goods." His obligation is to carry and deliver the goods in safety whatever happens. In the words of Lord Holt, "he is bound to answer for the goods at all events. Again the law charges the person thus entrusted to carry goods against all events but 'acts of God and of the enemies of the King,' and this broad obligation renders it unnecessary to import into the contract a special warranty of roadworthiness of the vehicle for if the goods are safely carried and re-delivered it would be immaterial whether the carriage was roadworthy or not. And if the goods are lost and damaged the carrier is liable on his broad obligation to be answerable 'at all events'; and it is unnecessary to inquire how that loss or damage arose." To put shortly, the argument is that as the common carrier by road is an insurer he is liable for the loss at all events. If the act of God or King's enemies occasion the loss, the common carrier is absolutely immune. In either case whether liable or immune, there is no need to consider whether the carriage is roadworthy or not. This argument ignores the fact that the common law exceptions such as acts of God, King's enemies, etc., are available only when the roadworthiness of the carriage is established. In *Barrett* v. *London General Insurance Co., Ltd.*,[1] the view is taken that there is an implied warranty of roadworthiness in a motor car. But the Privy Council in *Trickett* v. *Queensland Insurance Co., Ltd.*,[2] felt unable to follow that view.

Regarding the carriers by air, there is no direct case as to the implied warranty of airworthiness by a carrier by air. *Aslan* v. *Imperial Airways Ltd.*,[3] contains an observation that the Judge ought not to import into the contract of carriage by air such a warranty of fitness as was warranted into a contract of carriage by a ship and that a carrier by air is bound only to exercise reasonable skill in providing a reasonably safe machine. But the correctness of this observation may be questioned in view of the fact that the case was decided on special facts namely, that Messrs. Imperial Airways, Ltd., were not holding themselves out to carry the goods of all and sundry which is the usual indication of the business of a common carrier which fact compelled the Court to hold that that company was not a common carrier. At the same time the Judge expressed his opinion that there was no reason why a person who carried goods by a carriage through air should not be a common carrier if he acted as a common carrier. If this view is correct and if the argument that the principles underlying the law of carriage in and over whatever element should be the same is sound, it follows that the same warranty of fitness is implied in the carriage by air. This conclusion seems to gain support from the fact that section 9 of the Air Nagivation Act of 1920 (10 and 11, Geo., 5, c. 80) which makes the position of the owner of an aircraft even more burdensome than that of an insurer for any damage caused by an aircraft to a person or to his property on the surface by any person or article falling from it, etc., for which only the plea of contributory negligence on the part of the injured could be set up by the carrier—*vide* also Articles 2 and 3 of the Rome Convention of 1933.

To the above common law exceptions to the liability of a common carrier may be added the exemption created by statute. There is nothing in common law to prevent a common carrier from making a special contract to control or curtail his liability from that of an insurer.

Among carriers by land, *i.e.*, among mail contractors, stage coach proprietors or other common carriers a custom arose to post notices in their offices to the effect that unless the owner of the goods paid a carrier an additional sum as insurance fee in the case of particular goods, the carrier is not responsible for their loss. If knowledge of that notice to the consignor is proved, he is bound by the notice. Great difficulty and inconvenience were caused to the consignor on account of the

1. (1935) 1 K.B. 238 at 241.
2. (1936) A.C. 159.
3. (1933) 38 Com. Cas. 227: 149 L.T. 276: 49 T.L.R. 415.

insufficiency of this notice. Further, articles of great value were sent by the consignors in small parcels and the carriers without knowing their contents were not able to take proper care of them and were put to great risks and loss. So the Carriers Act of 1830 (1 Will. IV, c. 68), was passed—*vide* the corresponding Indian Carriers Act III of 1865. The Carriers Act of 1830 enacted that in the case of articles above £ 10 in value (which was subsequently raised to £ 25) the nature and value of the articles should be declared to the carrier at the time of delivery and that an increased rate, charged for such articles, should be paid. The articles mentioned in the list required particular care and they should be contained in a parcel or package. If articles whose value is above £ 10 were mixed with articles whose value is less than £ 10, and the value of the former not declared, then, in case of damage or loss, no damage as regards the former could be claimed but only that of the latter. If articles of value below £ 10 is an accessory to the undeclared articles above £ 10 in value, then the value of neither could be recovered in case of loss. In case of loss of declared articles, both their value and the increased charge had to be paid back by the carrier to the owner. Even if the loss of the declared articles were temporary, the Act applied but not when there was only a temporary delay. But if the injury to the undeclared article arose from the felonious act of a servant of the carrier, the act gave the carrier no protection.

It has to be noted that the Carrier's Act of 1830, was passed before Railways existed and the Act was not worded in terms to include them. But within the phrases " other public conveyances by land for hire ", and " other carriers " in the Carriers Act of 1830, they were included when questions relating to them came before Courts. The Carriers Act of 1830 did not prevent a carrier from limiting his liability even for gross negligence by entering into a special contract. The harshness and the injustice of this state of law caused great stir when the case of *Carr* v. *The Lancashire and Yorskhire Ry., Co.,*[1] was decided. To remove the injustice caused by the non-liability of the carrier even for gross negligence where he enters into special contract with the consignor, the Railway and Canal Traffic Act of 1854 was passed.

Section 2 of the Railway and Canal Traffic Act of 1854 provided that all Railway companies should afford reasonable facilities for the receiving, forwarding and delivering of traffic. Traffic includes passengers and their luggage, goods, animals and other things carried by any Railway company. Railway companies cannot refuse to carry goods which they have facilities of carrying, but they are not obliged to carry any goods as common carriers. Section 7 of this Act renders a Railway Company liable for loss or injury of goods caused by neglect or default of the Railway Company or its servants notwithstanding any notice to the contrary. The loss or injury must be caused by neglect or default of the company, or its servants. The default of the servant must be in the nature of negligence and within the scope of servant's authority. The liability of the Conpany in the case of certain animals is limited to certain definite sums unless their higher value is declared by the consignor. The conditions in a contract exonerating the carrier must be perfectly just and reasonable. In the case of existence of different rates for carriage, a fair alternative to choose between the lower uninsured and the higher insured rate had to be given. Further, the exonerating conditions should be embodied in writing signed by the consignor or his agent. The onus of proving misconduct of the Railway Company is on the plaintiff. Under the older forms of consignment note, a Railway Company was liable for loss, damage or delay. But under the forms in use under the Act, although goods were sent at the owner's risk the Company accept liability for non-delivery of any goods though they are addressed to the consignee, for pilferage from package and for misdelivery when goods are not delivered within a particular number of days though the goods are properly addressed. The Railway and Canal Traffic Act does not affect conditions relating to matters after end of transit or conditions relieving the Company after handing

1. (1852) 7 Exch. 707.

over the goods to another Carrier. Under the Act to make the Company liable, notice that they are intended for the market should be given. Complaints as to damage to goods should be given promptly to avoid the disappearance of facts to be investigated. A Railway Company under the Act is not bound to carry dangerous goods unless their nature is distinctly marked outside of the package. If the Railway Company does not know of their dangerous nature, the consignor is liable for the injury. If dangerous goods are carried at Company's risk without the Company knowing their dangerous condition, the Company is liable for loss or damage to the owners of other goods and the Company can recover it from the consignor. If such goods are carried at owner's risk, properly the Company is not liable, but owners of other goods may have a right of action against the consignor. And such consignor who did not apprise the Railway Company of the dangerous condition of the goods would be liable in damages for personal injury caused by such dangerous goods to a servant of the Company. If a company suspected a package to contain dangeorus goods it can require the reopening of it and examine the contents. It is for the Company to decide what goods are dangerous. The Railway and Canal Traffic Act requires Railway Companies to give facilities for through traffic on their lines and those of other Companies. If the receiving company contracts with the consignor to carry goods all the way and accordingly receive the goods, the receiving company is liable for the whole transit, unless the receiving company is exempted by any contract. A Railway Company can make any contract regarding goods after handing them over to another carrier company and such contract is not void on the ground of being unjust and unreasonable. In through contracts of carriage, the second company seem to act as the agent of the receiving company. If the receiving company contracts not to be liable after handing over goods to the second carrying company, then the receiving company acts as an agent of the second carrying company which in turn becomes liable as common carrier. But in any case if the loss occurs by the negligence of the second company or its servants, the latter company is liable.

In India also the Common law of England regulated the responsibility of common carriers at the time of the passing of the Carriers Act of 1865. It is still in force in India and is unaffected by sections 151 and 152 of the Indian Contract Act and they are insurers and not mere bailees: *M. Kant Shaw* v. *I. G. Steam Navigation Co.*[1] The Carriers Act does not apply to carriers by sea : *Bombay Steam Navigation Co., Ltd.* v. *Vasudev Babu Rao*[2]. Corresponding to section 7 of the Railway and Canal Traffic Act of 1854, section 6 of th Indian Carriers Act provides for limiting the liabilty of a carrier by a special contract by the owner of the goods or his authorised agent. The rights and duties of a common carrier in England which governs the rights and duties of a common carrier in India are recognised by the Carriers Act III of 1865. The liability of common carriers is not within the Indian Contract Act, notwithstanding some general expressions in the Chapter on bailments. But the Railway Acts of 1878 and 1890 reduce the liability of carriers by Railway to that of bailees under sections 151 and 152 of the Indian Contract Act : *Irawady Flotilla Co.* v. *Bhagavan Das*[3].

In the case of carriers by water, certain exceptions to common law liability as an insurer were created by statute.

By section 502 of the Merchant Shipping Act of 1894 the shipowner was made not liable for loss or damage caused by fire in a ship without his fault or privity. He is also freed from liability for robbery or embezzlement of gold, silver, diamonds, watches, jewels or precious stones if their value were not declared at the time of shipment and a higher freight is not paid.

By section 1 of the Merchant Shipping Act of 1900, this limitation of liability was extended to all cases, without the owner's actual fault or privity, of loss or damage to property or right of any kind whether on land or water, or whether

1. (1883) I.L.R. 10 Cal. 166 (F.B.).
2. (1927) I.L.R. 52 Bom. 37.
3. (1891) L.R. 18 I.A. 121 : I.L.R. 18 Cal. 620 (P.C.).

fixed or moveable by reason of improper navigation. Section 2 of the Act extended this immunity to owners of any dock or canal or harbour.

These provisions of the limitation of Shipowners' liability under Merchant Shipping Acts apply to loss of goods in transit under a contract which was in part for carriage by land; and by section 12 of the Railway Act of 1871 this benefit is extended to Railway Companies who are under contract to carry persons and who procure shippers to carry in their vessels.

By section 1 of the Maritime Conventions Act of 1911 when one vessel is injured by the default of two or more vessels, liability is proportionate to default. If the degree of default is not ascertainable, then the liability is equal when loss or personal injury to a person on board is caused by the default of carrying vessel and another. The liability is joint and several.

By section 7 of the Railway and Canal Traffic Act of 1854 the liability is limited to a definite sum in the case of horse, cattle, sheep, etc., unless their value is declared.

By the application of Carriage of Goods by Sea Act, 1924, 14 and 15 Geo. V, c. 22, to cases, to which this Act applies, certain standard causes with irreducible liability were introduced in all bills of lading. This Act does not apply to live animals, deck cargo, coasting trade etc. Under the Act the carrier is bound to supply seaworthy ships well equipped. He is bound to carefully load, handle, stow, keep and carry. But he can contract himself out of liability from the effects of unseaworthiness (provided he takes due diligience to guard against it), of excepted perils mentioned in Article IV (2) of the Act, and of deviation for saving or attempting to save life and property. Section 6 of the Carriers Act preserves to the carrier the right to destroy damaged goods under sections 446 to 450 of the Merchant Shipping Act of 1894.

In India as regards the statutory exemption from liability of a carrier by sea, the law is the same as in England and the Indian Merchant Shipping Act of 1923 and the Indian Carriage of Goods by Sea Act XXVI of 1925 limit in the same way the liability of a common carrier by sea.

Before enumerating the nature of exemptions created by statute regarding carriers by air, it is necessary to refer in brief to the relevant portion of the history of the aerial transport. The sovereignty of States, though in theory was claimed *usque ad cœlum*, was in practice confined only to the surface of the Earth and to a reasonable height above it. But when man began to take to air in aircraft more frequently, the problem for consideration as to the exercise of actual right of sovereignty over the surface arose. Two divergent views prevailed among jurists, one was that the air surface should be free to all above a particular height over the surface and the other was that the whole column of air and the space over the surface belonged to the State below. In 1910 a Conference was held at Paris which did not come to any final conclusion as the British delegates wanted exclusive sovereignty in the air space over its territories and as the German delegates stood for absolute freedom for all in air, above a particular altitude.

In England to protect the public from danger the Aerial Navigation Act of 1911 (1 and 2, Geo. V, c. 4) was passed empowering the Secretary of State to prohibit flight over particular areas. The Aerial Navigation Act of 1913 (2 and 3 Geo., V, c. 22) empowered the Secretary of State to include within his powers purposes of defence of the realm. By order in Council, the entry into the United Kingdom was limited to certain strips of coast and it specified certain compulsory landing grounds. In 1914, during the Great War, the flight of the aircraft over the United Kingdom was limited except within 3 miles of a recognised aerodrome. The experience of the Great War of 1914 to 1918 reinforced the view of State's right over the air *usque ad cœlum*. Holland, Denmark, Switzerland, regarded the passage of belligerant aircraft as a non-neutral act. In 1917 a Civil Aerial Transport Committee was appointed which recommended the adoption of *usque ad cœlum* theory while at the same time the Committee recognised the commercial advantage of uninter-

rupted flight of aircraft and emphasised the desirability of a liberal admission of foreign aircraft into the United Kingdom.

After the Treaty of Versailles 1919, the Paris International Convention for the regulation of aerial navigation of 1919 took place between the victorious powers. By articles of the Convention of Paris, of 1919, every contracting state has complete and exclusive sovereignty over the air space above its territory. The territory of a State shall be understood as including the national territory both that of the mother country and of the colonies and the territorial waters adjacent thereto. By article 2, each contracting party undertakes in time of peace to accord freedom of innocent passage above its territory to the air craft of the other contracting states. By article 15, every aircraft of a contracting State has a right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. This right is subject to the duty to land if ordered for reasons of general safety.

To give effect to the articles of the International Convention of Paris, 1919, the Navigation Act of 1920 (10 & 11, Geo. 5, ch. 80) was passed. It not only adopted the provisions of the Paris Convention of 1919, but it made further provision for the control and regulation of aviation. Further amendments were made to it by the Air Navigation Act of 1936 (26 Geo. 5 & 1 Ewd. 8, c. 44).

We may now turn to consider the statutory exemption from liability of the owner of an aircraft and classify them under two heads (1) His liability to surface damage; (2) His liability to goods and passengers in the aircraft. The Civil Aerial Transport Committee was appointed in or about 1917 to consider means for the development and regulation of aviation. It appointed a special Committee. The most important of its recommendations, adopted by the main Committee were that (1) No action for trespass should lie except for material damage to person or property whether caused by flight, ascent or landing or the fall of objects from an aircraft and (2) that the obligation on the air-men in an action for trespass should be absolute, negligence not being a necessary element in his liability and "unavoidable accident" no defence. The Parliament incorporated these recommendations when the Air Navigation Act of 1920 was passed, section 9 of which, as unaltered but amended by Air Navigation Act of 1936, enacted: "No action shall lie in respect of trespass or in respect of nuisance by reason only of the flight of the aircraft over any property at a height above the ground, which having regard to wind, weather, and all the circumstance of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of this Act and any Order made thereunder are duly complied with; but where material damage or loss is caused by an aircraft in flight taking off or landing or by any person in any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss without proof of negligence or intention or other cause of action as though the same had been caused by its wilful act, neglect or default, except when the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered." Thus the liability of the owner for the damage so caused is an absolute one unless the person suffering the damage is guilty of contributory negligence.

It is quite possible that the damage suffered by a person by any person or thing falling from the aircraft to be out of all proportion to the ability of the owner to pay. The Rome Convention of 1933 was the offspring of an attempt to unify private aerial law and also to unify rights relating to damage caused by aircraft. Gorrel Committee in their report of 1934 supported the adoption of their schemes for aircraft engaged in international flying in the United Kingdom.

But the Rome Convention while limiting the liability of the operator of the aircraft between 6,00,000 francs and 21,000,000 at the rate of 250 francs for each kilogramme of the weight of the aircraft for such surface damage insisted on a simultaneous furnishing of the security in the shape of a deposit of money or bank

guarantee by the owner of the aircraft equivalent to an amount not less than the amount of that limited liability so that compensation to the injured might be assured *vide* articles 8 and 15 of the Rome Convention.

Accordingly the Air Navigation Act of 1936, which was enacted to give effect to the Rome Convention, limited by section 15 the liability of the owner of the air craft in accordance with the provisions of the second schedule to this Act, *i.e.*, between £ 1,000 and £ 25,000 and if the weight of air craft exceeds 10,000 lbs. at the rate of £ 1 for each pound of aircraft fully loaded. Section 16 of this Act ensured that a person shall not fly an aircraft unless there is in force in relation to the flying of an aircraft by that person a policy of insurance by an authorised insurer or a security given by an authorised giver of securities for the amount of that limited liability.

Next we turn to the liability of the owner to the goods, luggage and passengers in the aircraft. From what is narrated above it is evident that the Paris Convention of 1919 led to the enactment of the Air Navigation Act of 1920 dealing with the liability of the owner of the aircraft for surface damage. The Rome Convention of 1933 led to the enactment of the Air Navigation Act, 1936, which limited the liability of the owner of the aircraft, but led to the creation of a concomitant obligation in him to insure against or take security for any surface damage. The Warsaw Convention of 1929 was held to unify the rules relating to International Carriage by air. To give effect to the Warsaw Convention of 1929 the Carriage by Air Act of 1932 was passed which adopted the rules of the Warsaw Convention. Section 4 of the Act expressly gave power to His Majesty in Council to apply these rules to internal carriage by air in the United Kingdom. Until this power is exercised, the law of "common carriers" under the common law must apply. But an association of the Chief Navigation Companies called the International Air Traffic Association was formed with its headquarters at Hague. It has adopted certain general conditions of carriage of passengers, luggage and goods which conditions are largely based on Warsaw Rules and all air navigation companies agreed to adopt these forms in all contracts of carriage whether internal or international. If we closely analyse the provisions of the Warsaw Conventionand the Carriage by Air Act of 1932 and the conditions of carriage of the International Air Traffic Association, it will be evident that there is much in common between those conditions and the law of common carriers in the English common law which fact draws us to the conclusion that except in certain matters the Carriage by Air Act of 1932 and the International Air Traffic Association Companies drew their inspiration from the law of "common carriers" that obtained in England.

As regards the liability of a carrier by air to passengers and luggage or goods in the aircraft, articles 17 to 21 of schedule I to the Carriage by Air Act, 1932 and the corresponding Article 20 of the International Air Traffic Association provide that in the event of damage caused by death or the wounding of a passenger by an accident on board the aircraft, or in the course of embarking or disembarking, the carrier is liable for damage sustained unless the carrier proves that he has taken all measures to avoid the damage or that it was impossible for him to avoid the damage and that in the event of damage caused by loss or delay in the luggage or goods, the carrier is liable unless he proves negligence in the pilotage, handling or navigation of the aircraft or unless he proves that he has taken all necessary measures or that it was impossible for him to take such measures to avoid the damage or that the injured person was guilty of contributory negligence.

Such liability of the Carrier by air is limited, by Articles 22 and 23 of Schedule I to the Air Navigation Act of 1932 and by Article 2 of the International Air Traffic Association, to 125,000 francs for each passenger and to a sum of 250 francs per kilogramme in the carriage of registered luggage and of goods unless the consignor

has made, at the time when the package was handed over to the carrier a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that the sum is greater than the actual value to the consignor at delivery. As regards the objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger. By Article 23 of the Schedule I to the Act, any provision tending to relieve the carrier from liability or to fix a lower limit than that which is laid down in this convention shall be null and void but the nullity of such provision does not involve the nullity of the whole contract.

In India there is no provision limiting the liability of the owner of an aircraft for surface damage caused by the fall of any person or thing from an aircraft corresponding to sections 15 and 16 of the Air Navigation Act of 1936: but regarding the liability of its owner for damage caused to the passengers, luggage or goods, the same rules were made applicable to limit the liability by the Indian Carriage by Air Act 20 of 1934 to which the same first schedule of the English Carriage by Air Act of 1932 was incorporated (*vide* Rules 17 to 21 as to the liability of the carrier and rules 22 and 23 as to the limit of such liability, in Schedule I of the Indian Carriage by Air Act of 1934.)

PROMISSORY NOTES BY *DE FACTO* GUARDIANS.

BY

C. A. SESHAGIRI SASTRI, ADVOCATE, MADRAS.

It has been held in the recent decision of the Full Bench of the Madras High Court in *Myneni Pundarikakshayya* v. *Kondamudi Sriramulu*[1] that a *de facto* guardian of a Hindu minor has no power to execute a promissory note in any circumstances so as to bind the minor's estate.

This decision is likely to affect a large number of transactions and it may not be inappropriate to examine its basis. At the outset, it must be noticed that the execution of promissory notes is the ordinary mode of creating an indebtedness in this country and they are not strictly looked upon as merely commercial securities used only among businessmen. Of course, when there are special rules applicable to promissory notes by reason of their being negotiable instruments, they should not be overlooked in dealing with such instruments. Again, the person who is compendiously called a *de facto* guardian is not generally a stranger meddling with the assets of a minor but a close relation of the minor like a maternal or paternal uncle or the natural father of an adopted son who has the interests of the minor at heart and consequently manages the estate of the minor. It is not usual in this country to resort to the provisions of the Guardian and Wards Act for the appointment of a guardian unless there is a quarrel among the members of the minor's family or there is a scramble for managing his properties.

In this discussion, we are only concerned with the powers of a *de facto* guardian under the Hindu Law and not those of a *de facto* guardian of a Muhammadan minor. It has been held by the Privy Council in *Imambandi* v. *Mutsaddi*[2] that a *de facto* guardian under the Muhammadan Law has no power to alienate the minor's immoveable properties under any circumstances, although a different view had been taken on an examination of the original texts of the Muhammadan Law by a bench of the Madras High Court of which a Muhammadan Jurist and Judge was a member. See *Ayderman Kutti* v. *Syed Ali*[3].

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1. (1945) 2 M.L.J. 375 (F.B.).
2. (1918) 35 M.L.J. 422 : L.R. 45 I.A. 73 : I.L.R. 45 Cal. 878 (P.C.).
3. (1912) 23 M.L.J. 214 : I.L. 37 Mad. 514.

Coming to the Hindu Law, the foundation of the law on the subject rests on the well-known passage at pages 412 and 413 of the leading case in *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonwaree*[1]. There, their Lordships have laid down that the absence of the *de jure* title in the guardian does not detract from the powers of a manager to charge the minor's properties in proper cases. Though the case itself was one of a mortgage by the guardian, the same rule has been since applied to cases of sales and other forms of alienation of minor's properties and also to cases of simple contracts made by guardians binding minor's general assets. That this rule established by the decision in *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonwaree*[1] should not in any way be interfered with was pointed out when dealing with the question of the liability of a minor's estate on a simple contract entered into by his guardian on his behalf by Sir Lionel Leach, C.J. and K.S. Krishnaswami Aiyangar, J., in *Annamalai Chetty* v. *Muthuswami Maniagaran*[2] following the Full Bench decision in *Ramajogayya* v. *Jagannadan*[3]. The rule laid down in *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonwaree*[1] has been applied not merely to the case of a *de jure* or a *de facto* guardian of a minor, but also to all cases of qualified owners under the Hindu Law and managers such as a Hindu widow, the manager of a joint family, shebaits whether *de facto* or *de jure* and the manager of a lunatic's estate. It has also been recognised that there is no distinction between the powers of a *de jure* and a *de facto* guardian in regard to a minor's properties and that a *de jure* guardian has no greater powers has been laid down following the enunciation of the law by the Privy Council in the leading case of *Hunooman Persaud*[1]. See *Seetharamanna* v. *Appiah*[4], *Ramaswami* v. *Kasinatha*[5] and *Mukkamalla Hanumayamma* v. *Kasineni Lakshmidevamma*[6].

If as pointed above, the powers of a *de facto* guardian are the same as those of a *de jure* guardian, it remains to see whether a minor's estate can be made liable on a promissory note made by a *de jure* guardian provided, of course, that the note is executed by him *qua* guardian excluding his personal liability and for purposes binding on the minor's estate. The question came up for consideration by a Bench of the Madras High Court in *Swaminatha Odayar* v. *Natesa Iyer*[7] and one of the learned Judges held that though as debt, it may be binding on the minor, a minor's estate cannot be made liable on the promissory note. Then, the question came on a reference before a Full Bench in *Satyanarayana* v. *Mallayya*[8], where the previous case-law was reviewed; and it was decided by the Full Bench overruling the observations in *Swaminatha Odayar* v. *Natesa Iyer*[7] that a minor's estate will be liable on a promissory note executed by a *de jure* guardian. No doubt, it has since been held that surrounding circumstances should not be looked into for deciding in what capacity a promissory note has been executed. See *Sivagurunatha Pillai* v. *Padmavathi Ammal*[9] where the observations to the contrary in *Satyanarayana* v. *Mallayya*[8] *i.e.*, that surrounding circumstances can be gone into for deciding in what capacity the note was executed by the person executing it, have been disapproved. But, this does not affect the correctness of the Full Bench decision in *Satyanarayana* v. *Mallayya*[8] that the estate of a minor can be made liable on a properly executed promissory note of his guardian representing the minor's estate for a necessary purpose. That a minor's estate can be rendered liable on his guardian's promissory note has since been subsequently followed. See *Seetharamayya Garu* v. *Sathiah.*[10] If so, it would seem to follow that a promissory note executed by a *de facto*

1. (1856) 6 M.I.A. 393.
2. (1939) 1 M.L.J. 792 : I.L.R. (1939) Mad. 891.
3. (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 185 (F.B.).
4. (1926) I.L.R. 49 Mad. 768 at 771.
5. A.I.R. 1928 Mad. 226 at 230.
6. (1938) 2 M.L.J. 632 at 634.
7. (1932) 65 M.L.J. 350 : I.L.R. 56 Mad. 879.
8. (1935) 68 M.L.J. 540 : I.L.R. 58 Mad. 735 (F.B.).
9. (1941) 1 M.L.J. 441 : I.L.R. (1941) Mad. 513 (F.B.).
10. (1938) M.W.N. 677 : A.I.R. 1938 Mad. 716.

guardian, provided of course it is executed in such a form as to exclude the personal liability of the guardian and is expressed to be executed by the *de facto* guardian in the capacity of such a guardian will equally be binding on the minor's estate if it is for a binding purpose, because a *de facto* guardian's powers are no less than those of a natural guardian as laid down by the decisions referred to above. It may be mentioned in this connection that there is no provision of the Negotiable Instruments Act which prohibits a guardian whether *de facto* or *de jure* from executing a promissory note on behalf of his ward. So, the circumstance that it is a negotiable instrument would not seem to go against its validity as a negotiable instrument. Again, that a Hindu minor is bound by the simple covenant by his *de facto* guardian for a binding purpose has been held by a bench of the Madras High Court in *Sudarsana Rao* v. *Dalayya*[1].

It now remains to notice that there is an observation of Ramesam, J., when delivering the judgment of the Full Bench in *Satyanarayana* v. *Mallayya*[2] to the effect that *Swaminatha Odayar* v. *Natesa Iyer*[3], could be supported on the ground that the promissory note in the latter case was by a *de facto* guardian. This observation was purely *obiter* as the case before the Bull Bench was a case of a *de jure* guardian and the question about the validity of a promissory note by a *de facto* guardian was not considered by their Lordships and the cases from *Hunooman Persaud's case*[4] identifying the position of a *de facto* guardian with that of a *de jure* guardian were not considered by the learned Judges. Again, there is the decision of a single Judge in *Vembu Iyer* v. *Subbiah Pillai*[5]. Judged from the report, the only points considered by the learned Judge was whether the natural father of an adopted boy is his lawful guardian and whether a promissory note executed by him was binding on the minor and the decisions referred to above about the power of a *de facto* guardian were apparently not referred to before him. There is also a decision of another single Judge in *Madava Pillai* v. *Subramania Udayar*[6], which seems to sound the other way, that a promissory note executed by a *de facto* guardian may under proper circumstances be binding on the minor's estate. The decision of the Bombay High Court in *Nagindas Gokuldas* v. *Bhimrao Damu*[7], referred to in the Full Bench decision under notice does not give full effect to the observations of the Privy Council in *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonwaree*[4] identifying the powers of a *de facto* guardian with those of a legal guardian and the above remarks would seem to apply equally to the Bombay decision.

The result of the present Full Bench decision would be that for a binding purpose the *de facto* guardian of a Hindu minor can sell away his properties or mortgage or charge the same and also create simple contract debts, but cannot execute a promissory note binding on the minor.

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1. (1943) 1 M.L.J. 339 : I.L.R. (1944) Mad. 879.
2. (1925) 68 M.L.J. 540 : I.L.R. 58 Mad. 735 (F.B.).
3. (1932) 65 M.L.J. 350 : I.L.R. 56 Mad. 218.
4. (1856) 6 M.I.A. 393.
5. (1943) 1 M.L.J. 85.
6. (1943) 2 M.L.J. 556.
7. I.L.R. (1943) Bom. 117.

ON DEMAND MORTGAGE BONDS—LIMITATION.

BY

T. E. RAMABADRACHARIAR, ADVOCATE, MADRAS.

A doubt has been raised regarding the correctness of the Full Bench decision in *Venkitaswamy Chetty v. Ramalingam.*[1] The source of doubt is indicated to be the decision of the judicial committee in *Nilkanth Balwant Natu* v. *Vidya Narasinh Bharatiswami.*[2] An examination of that case would show that the assumption made in the critical note[3] that it was an "On demand" mortgage bond that was under consideration there is not justified by the report of that case. No text writer or authority has read this case in the manner in which the critic wishes to read it.

Coming to our own province *Perianna Goundan* v. *Muthuvira Goundan*[4] has not been overruled so far by any competent authority. It is a direct case on the point and a decision of a bench which has held the field till this date. *Seetharama Aiyar* v. *Muniswami Mudaliar*[5] which is the only case exhaustively reviewing the case-law rests content with concession of counsel, as it cannot overrule *Perianna Goundan* v. *Muthuvira Goundan.*[4]

The real difficulty in understanding and reconciling the cases is raised by *Lasa Din* v. *Gulab Kunwar.*[6] Every mortgage is a security for a loan so that in every such contract there is a contract of loan and a security. So far as contracts of loan are concerned the starting point must be ascertained by a reference to one or other of the articles from 57 to 80 of the Limitation Act. Article 132 gives no indication but refers us back to those articles for ascertaining the starting point. Examining these articles one finds that Article 60 alone provides for a case where demand and its date start the running of time and unless the decisions which hold the date of demand as starting the limitation are assimilated into this article it will be difficult to explain them on any legal or rational basis.

The only method of reconciliation is to start with the accepted principle that a term in a secured loan is intended for the benefit of the mortgagee as much as for a mortgagor, for the mortgagee is as anxious to have a safe investment for the term. So considered the loan is in the nature of a "deposit" during the term. The right to demand the deposit during the term depends upon the happening of a contingency *viz.*, the breach of a covenant. This is the only logical way of understanding *Lasa Din* v. *Gulab Kunwar.*[6] *Cadet Questio* the decision is a just one and it must be maintained on principle and authority.

SUMMARY OF ENGLISH CASES.

DOWD *v.* BOASE & CO., LTD., (1945) 1 All.E.R. 605: (1945) 1 K.B. 301 (C.A.).

Master and Servant—Respondent superior—Applicability—Negligence of servant driving vehicle hired to another—Accident caused to another servant—Liability—Hirer or regular employer—Test.

Where a workman who has caused an accident to a fellow-workman was driving a vehicle belonging to his master, of which he was in sole charge and which he alone was allowed to drive, it is not easy to establish that the hirer of the vehicle with the driver was his "superior" at the time of the accident. Who was the superior at the time of the accident must depend in each case on the facts of that case, and no case can be said to govern another unless the facts are similar in all respects. One test in cases of a vehicle lent with its service to a hirer is "In the doing of the negligent act was the workman exercising the discretion given him by his general employer, or was he obeying or discharging a specific order of the party for whom, upon his employer's direction, he was using the vehicle or other instrument?" Where the accident to a fellow-worker takes place due to the negligent driving of the vehicle, the driver must be deemed to be exercising a discretion vested in him by his regular employer when he was sent out with the vehicle—and he made a mistake with which the hirers had nothing to do. Accordingly the regular employers and not the hirers were liable for the negligence.

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1. (1945) 1 M.L.J. 233 (F.B.).
2. (1930) 59 M.L.J. 379: L.R. 57 I.A. 194: I.L.R. 54 Bom. 495 (P.C.).
3. (1945) 2 M.L.J. Jour. 27.
4. (1897) 7 M.L.J. 319: I.L.R. 21 Mad. 139.
5. (1918) 37 M.L.J. 613.
6. (1932) 63 M.L.J. 187: L.R. 59 I.A. 376: I.L.R. 7 Luck. 442 (P.C.).

SRINIVASAN *v.* SRINIVASAN, (1945) 2 All.E.R. 21 (P.D.A.).

Divorce—Hindu already having a Hindu wife going through a form of marriage with an English woman in England—English marriage a nullity—Polygamous marriages—Recognition in English law.

Courts in England will not refuse to recognise a marriage between two Hindus, notwithstanding its potentially polygamous character. The suggestion in the standard text books that the only kind of marriage which English Law recognises is one which is essentially the voluntary union for life, of one man with one woman, to the exclusion of all others is wrong. Accordingly where an English woman who has been married by a Hindu who had already a Hindu wife living prays for a decree that her marriage was null and void, the Court will recognise as a fact the Hindu marriage and declare the English marriage a nullity.

[Followed in *Baindail* v. *Baindail*, (1945) 2 All.E.R. 374 (P.D.A.), where it was further held that it was immaterial whether the husband was domiciled in British India or in England.]

COWEN *v.* COWEN, (1945) 2 All.E.R. 197.

Divorce—Husband persisting in use of contraceptives and resorting to coitus interruptus *in spite of wife wishing to have a child—Right to dissolution of marriage on ground of non-consummation.*

Where a husband persists in using contraceptives and resorts to *coitus interruptus* in spite of the fact that the wife who consented to the use of contraceptives had withdrawn such consent and wished to have a child, the wife is entitled to a dissolution of the marriage on the ground of non-consummation. Sexual intercourse cannot be said to be complete when a husband deliberately discontinues the act of intercourse before it has reached its natural termination or when he artificially prevents that natural termination, which is the passage of the male seed into the body of the woman. A marriage cannot be held to have been consummated by an act so performed that one of the principal, if not the principal end, of marriage is intentionally frustrated. Her consent for appropriate reasons at the earlier period to such imperfect intercourse will not be a bar to her right to relief.

HICKMAN *v.* PEACEY, (1945) 2 All.E.R. 215 (H.L.).

Evidence—Death in common calamity—Presumption of survivorship—Law of Property Act (1925), *section* 184.

Per *Lord Macmillan, Lord Porter and Lord Simonds* (*Viscount Simon and Lord Wright, dissenting*)—Where two persons perish in a common calamity and there is no evidence as to who died first it is necessarily left uncertain whether they died consecutively or simultaneously, although the circumstances may point with high probability to their not having died at the same moment. In such cases the death shall be presumed to have occurred in the order of seniority and the younger shall be deemed to have survived the elder. (1944) 1 All.E.R. 81 (C.A.), reversed.

HANNAH *v.* PEEL, (1945) 2 All.E.R. 288 (K.B.D.).

Finder of lost article—Right as against all except true owner—Brooch found by occupier in requisitioned house—Person entitled to the brooch.

H, a lance corporal, was stationed in a requisitioned house which was used as a sick bay. In a wall crevice *H* found a brooch of considerable value which he handed over to the police and obtained a receipt. The freehold of the house had been conveyed to the owner only recently just two years before the finding of the brooch. The true owner of the brooch was never found. *H* claimed the brooch as the finder and as such having a good title against all the world save only the true owner. The owner of the house on the other hand claimed the brooch as the free-holder on whose property the brooch was found. The free-holder had never been in actual possession of the house.

Held, the place in which a lost article is found does not constitute any exception to the general rule of law, that the finder is entitled to it as against all persons except the owner. A man does not necessarily possess a thing which is lying unattached on the surface of his land even though the thing is not possessed by some one else. Accordingly *H*, the finder, is entitled to the brooch as the finder.

JOTTINGS AND CUTTINGS.

PRACTICE NOTE*—15th Feb. 1945.

Appeal to Privy Council—Constitutional questions between Federal and Provincial Governments—Costs.

Where the judgment of the Board dismissing an appeal by the Governor-General in Council from a decree of the Federal Court of India and upholding the validity of the sales tax legislation passed by the legislature of the respondent, the Province of Madras, was silent as to costs, their lordships on an application by the respondent for the costs of the appeal, directed that the judgment would stand as delivered.

During the course of the argument on the application Lord Russell of Killowen drew attention to the usual practice of making no order as to costs in appeals from Canada involving constitutional questions between the Dominion and a Province, and referred to *Attorney-General for Manitoba* v. *Attorney-General for Canada*, (1925) A.C. 561 at 569, where it was said :

"In accordance with the usual practice there will be no costs."

The position in India was not strictly the same as in Canada, said his Lordship, but was very analogous; it was between Government in the Province and Government in the centre, and he thought that the same practice would probably prevail, and it would be followed in the present case (*Governor-General in Council* v. *Province of Madras*,[1] ante, p. 91). [L.R. 72 I.A. 175.]

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* Present : Lord Russell of Killowen, Lord Porter, Lord Simonds and Sir Madhavan Nair.

1. (1945) 1 M.L.J. 225.